IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

OLGA TORRES and PEDRO BONILLA, **Plaintiff(s)** **v.** BELLA VISTA HOSPITAL, INC., et at., **Defendant(s)**	**CIVIL NO.** 06-2158(JAG)

OPINION AND ORDER

GARCIA-GREGORY, D.J.

Pending before the Court are: 1) Watson Wyatt & Company's ("Watson Wyatt") Motion to Dismiss (Docket No. 38), 2) Banco Popular de Puerto Rico's ("BPPR") Motion to Dismiss (Docket No. 34), 3) Pannell, Kerr & Foster's ("PKF") Motion to Dismiss (Docket No. 39), 4) Bella Vista Hospital, Inc's ("the Hospital") and Ruben Perez's (collectively "Defendants") Motion to Dismiss (Docket No. 45), and 5) Ruben Perez's Motion for Partial Summary Judgement (Docket No. 31). For the reasons set forth below, the Court **DENIES** in part and **GRANTS** in part the Motions.

FACTUAL AND PROCEDURAL BACKGROUND

1. The Hospital

The Hospital is a non-profit corporation organized under the laws of Puerto Rico and operated by the General Conference of the Seventh Day Adventist Church, a corporation authorized to do

business in the Commonwealth of Puerto Rico. (Docket No. 78). The main purposes of the Hospital is to provide medical facilities to persons in need of such services, and to spread the gospel as is understood by the Seventh Day Adventist Church. (See Docket No. 34, Exh. A). The Hospital is operated by the Unión Adventista Puertorriqueña[1], which reports to the Interamerican Division of the General Conference of the Seventh Day Adventist. (Docket No. 78).

According to the Hospital's by-laws, the Seventh Day Adventist Church delegates its responsibilities for running the Hospital to the Hospital's Board of Trustees. The Hospital's by-laws state that half of the members of the Board of Trustees must be members of the Seventh Day Adventist Church. Moreover, the Hospital's by-laws also provide that four (4) of the nineteen(19) members of the board of Trustees must be members of the Unión Adventista Puertorriqueña. (Docket No. 34, Exh. BB). Currently, the President and the Vice-President of the Finance Committee are officers of the Unión Adventista Puertorriqueña. (Docket No. 78). However, none of the members of the Hospital's Board of Trustees is appointed by the Church.

2. The Plan

On January 1, 1982, the Hospital created an Employee Pension

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[1] The Hospital's by-laws state that the Hospital is operated by the Antillian Union Conference of Seven Day Adventists. (Docket No. 34, Exh. BB). However, the Hospital clarified that no entity by that name exists and the correct name is Unión Adventista Puertorriqueña. (Docket No. 78).

Benefit Plan known as the Bella Vista Hospital, Inc. Pension Plan ("the Plan"). The Plan was co-administered by the Unión Adventista Puertorriqueña and the Interamerican Division of the General Conference of the Seventh Day Adventist, who was designated as the administrator and named fiduciary of the Plan. (Docket No. 78).

A Retirement Committee was in charge of the general administration of the Plan and was responsible for carrying out its provisions. The members of the Retirement Committee were appointed by the Hospital's Board of Trustees and could be removed by the Board at any time. (Docket No. 34, Exh. A).

Even though the Plan had been subject to three different set of rules, (See Docket No. 1 ¶ 34), only the 1982 rules are on record before the Court. (See Docket No. 59, Exh. 2). Among other things, the 1982 rules established that at the time of the Plan's creation it was subject to ERISA and that the Hospital, acting through its Board of Trustees, could delegate the administration of the Plan to any person or entity. (Docket No. 59, Exh. 2).

On July 29, 1983, a deed of trust was executed, establishing the Bella Vista Hospital Pension Trust ("the Trust"). (Docket No. 34, Exh. B). The Trust named Banco de Ponce as trustee, but BPPR became the successor in interest as trustee. (Docket No. 34).

On January 24, 1996, the Internal Revenue Service ("IRS") issued a determination letter stating that the Hospital was "exempt from Federal income tax under section 501(a) of the Internal

Revenue Service ("IRS"). (Docket No. 34, Exh. C). In 1997, the Hospital filed a Form 5500 along with its federal income tax return, which had an attached notation entitled "Pension Plan" that stated: "The Plan is subject to the provisions of the Employee Retirement Income Act of 1974 (ERISA)." (Docket No. 40, Exh. 5, 6).

In 2000, following a request by the Hospital, the IRS issued a ruling, which stated that the Plan was "a Church Plan within the meaning of section 414(e) of the Code." Said ruling also stipulates that the "ruling is directed only to the taxpayer who requested it" and that "[s]ection 6110(k)(3) of the Code provides that it may not be used or cited by others as precedent." (Docket No. 34. Exh. A).

On August 14, 2003, the Plan was terminated and liquidated. (Docket No. 34, Exh. D). Two corporations whose service were instrumental in the termination and liquidation of the Plan were: Watson Wyatt and PKF.

Watson Wyatt was a corporate service provider to the Plan. Said company provided actuarial and consulting services regarding the establishment, administration, termination and liquidation of the Plan's benefits, the valuation of the Plan's assets and provided certain documents and rules for the Plan. (Docket Nos. 1, 38).

PKF is a certified accounting firm that acted as a service provider to the Plan and to the Hospital. The firm's services included accounting and financial consulting regarding the

administration, operation and termination of the Plan.

3. Plaintiffs

Olga Torres and Pedro Bonilla ("Plaintiffs") were both employed by the Hospital and Participated in the Plan. (Docket No. 1). Plaintiff Bonilla became disabled in 1998 and plaintiff Torres became disabled in 1999. As a result of the termination and liquidation of the Plan, Plaintiffs did not receive the benefits they would have received under the Plan had it remained covered by ERISA. (Docket No. 59). On 2004, Plaintiffs filed a lawsuit in state court against, the Hospital, BPPR, the Antillian Union Conference of the Seventh Day Adventist, the Retirement Committee of the General Conference, the General Conference of Seventh Day Adventist, and the Plan, to recover lost benefits. (Docket 34, Exh. H).

On November 17, 2006, Plaintiffs filed a complaint in this Court against: 1)the Hospital, 2) BPPR, 3) The Antillian Union Conference of the Seven Day Adventist[2] 4) the Retirement Committee of the General Conference of the Seventh-Day Adventist Interamerican Division, 5) the General Conference of Seventh Day Adventist, 6) Bella Vista Hospital Pension Plan and Trust, 7) the Adventist of the Seven Day Interamerican Division Retirement Plan, 8) Bella Vista Hospital, Inc. 401 K Plan and Trust, 9) Watson

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[2] Defendants stated in their "Opposition to Report and Recommendation of U.S. Magistrate Judge" that the correct name for said entity is Union Adventista Puertorriqueña. (See Docket No. 78).

Wyatt, 10) PKF, 11) Miguel Ramos and the conjugal partnership between him and his spouse, and 12) Ruben Perez and the conjugal partnership between him and his spouse for declaratory relief; violations of the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. §§ 1001 et seq. ("ERISA"); and Puerto Rico law claims for professional malpractice, misrepresentation, breach of contract, and tort. (Docket No. 1). The state court lawsuit was stayed pending resolution of this action. (See Docket Nos. 34, Exh. CC, 59)

On March 7, 2007, co-defendant Ruben Perez filed a Motion for Partial Summary Judgement. In said motion, Ruben Perez stated that in the complaint he is named as: the President of the Antillian Retirement Committee of the General Conference, the Treasurer of the Antillian Union Conference of the Seventh Day, representative of the Conference of the Seventh Day Adventist and Vice-President of Bella Vista Hospital, Inc. Ruben Perez conceded that he is the Vice-President of Bella Vista Hospital, Inc. but denied that he has any authority or representative capacity over the other organizations, which Plaintiffs allege he is part of. As such, Ruben Perez contends that all claims of liability against him that arise from the following organizations should be dismissed. (Docket No. 31). Plaintiffs did not oppose Ruben Perez's Motion for Partial Summary Judgement.

On March 12, 2007, BPPR filed a Motion to Dismiss under

Fed.R.Civ.P.12(b)(1), alleging that this Court does not have subject matter jurisdiction over this action because Bella Vista Hospital, Inc. Pension Plan ("the Plan") is a church plan and, therefore, is not covered by ERISA. Alternatively, BPPR argued that the Court should not exercise its discretion to entertain the action for declaratory relief. (Docket No. 34). Plaintiffs opposed BPPR Motion to Dismiss (Docket No. 59) and BPPR filed a reply to Plaintiffs' opposition (Docket No. 67).

Defendants Watson Wyatt, PKF, the Hospital, Ruben Perez each filed Motions to Dismiss in which they also contend that the Plan is not subject to ERISA because it is a church plan. (Docket Nos. 38, 39, 45). Plaintiffs opposed said Motions to Dismiss, (Docket Nos. 60, 64), and Defendants subsequently replied to Plaintiffs' opposition. (Docket Nos. 69, 72).

In its Motion to Dismiss, Watson Wyatt also moved pursuant to Rule 12(b)(6) to dismiss the causes of action for breach of fiduciary duties on the ground that it is not a plan fiduciary. Furthermore, Watson Wyatt contended that Plaintiffs' state tort causes of action should be dismissed as time barred on the grounds that this lawsuit was filed more than a year after the statute began to run. (Docket No. 38).

PKF, together with Watson Wyatt, also moved to dismiss Plaintiffs' state law tort causes of action as time barred. Moreover, PKF moved to dismiss Plaintiffs' breach of contract claim

on the ground that the complaint did not adequately allege a cause of action. Finally, PKF sought the dismissal of Plaintiffs' ERISA claims against it arguing that they were time barred. (Docket No. 39). All of Defendants' Motions to Dismiss were referred to Magistrate-Judge Bruce J. McGiverin for a Report and Recommendation.

On August 23, 2007, Magistrate-Judge Bruce J. McGiverin issued his Report and Recommendation. First, the Magistrate Judge decided to treat Defendants' Motions to Dismiss, on the grounds that the Plan is a church plan, as Motions for Summary Judgement. The Magistrate Judge determined to convert Defendants' Motions to Dismiss into Motions for Summary Judgment because ERISA provided the basis for both subject matter jurisdiction and the causes of action. Furthermore, the Magistrate-Judge noted that the facts relevant to the merits of Plaintiffs' claims are also the facts relevant to the determination of subject matter jurisdiction. After analyzing said Motions to Dismiss (now converted into motions for summary judgement), the Magistrate Judge determined that Defendants failed to prove that the Plan was a church plan. Consequently, the Magistrate-Judge recommended that Defendants' Motions to Dismiss be denied.

Second, the Magistrate-Judge did not agree with BPPR's contention that the Court should not exercise its discretion to entertain the action for declaratory relief. The Magistrate-Judge

recommended that the Court entertain Plaintiffs' declaratory judgement action because it is based entirely on federal law and because the state court had already taken action to prevent duplication of judicial efforts. Third, the Magistrate-Judge recommended that the Court deny Watson Wyatt's Rule 12(b)(6) Motion to Dismiss based on the allegation that it was not a plan fiduciary. The Magistrate-Judge noted that in accordance with the Rule 12(b)(6) standard, the Court must accept as true all well-pleaded factual claims and Plaintiffs clearly alleged that Watson Wyatt was a plan fiduciary that exercised its discretion in its management and administration of the Plan.

Fourth, the Magistrate-Judge determined that Plaintiffs' Puerto Rico tort and contract causes were not preempted by ERISA. Consequently, the Magistrate-Judge recommended that PKF's Motion to Dismiss on these grounds be denied. Fifth, the Magistrate-Judge considered Watson Wyatt and PKF's contention that Plaintiffs' state law tort causes were time barred. The Magistrate-Judge agreed with Watson Wyatt and PKF's allegation and recommended that their Motion to Dismiss the state law tort claims as time barred be granted.

Sixth, the Report and Recommendation analyzed PKF's allegation that Plaintiffs' breach of contract claim should be dismissed because the complaint does not adequately allege a cause of action. The Magistrate-Judge concluded that Plaintiffs' pleadings were not sufficient to bring forth a breach of contract action against PKF.

Seventh, the Magistrate-Judge recommended that PKF's Motion to Dismiss, on the grounds that Plaintiffs' ERISA claim against them was time barred, be granted. Finally, the Magistrate-Judge recommended that Defendant Ruben Perez's unopposed Motion for Partial Summary Judgement be granted. (Docket No. 73).

On August 20, 2007, Defendants the Hospital and Mr. Ruben Perez as Vice President of the Hospital objected the Magistrate-Judge's conclusion that the Plan is not a church plan. (Docket No. 78). On August 21, 2007, Watson Wyatt also filed their objections to the Report and Recommendation. Specifically, Defendant Watson Wyatt alleged that the Plan is a church plan exempted from ERISA coverage and that it is not a fiduciary under ERISA. In addition, Watson Wyatt contends that if the Court determines that it is not a plan fiduciary, Plaintiffs' ERISA claims against it should be dismissed as they are time barred. (Docket No. 80). The Court will address each of the Defendants' objections.

STANDARD OF REVIEW

1. Motion to Dismiss Standard.

Under Fed.R.Civ.P. Rule 12(b)(1), a defendant may move to dismiss an action for lack of subject matter jurisdiction. As courts of limited jurisdiction, federal courts must narrowly construe jurisdictional grants. See e.g., Alicea-Rivera v. SIMED, 12 F.Supp.2d 243, 245 (D.P.R. 1998). Consequently, the party asserting jurisdiction has the burden of demonstrating the

existence of federal jurisdiction. See Murphy v. United States, 45 F.3d 520, 522 (1st Cir. 1995); Diaz Serrano v. Caribbean Records Inc., 270 F.Supp.2d 217 (D.P.R. 2003). When deciding whether to dismiss a complaint for lack of subject matter jurisdiction, the Court "may consider whatever evidence has been submitted, such as ... depositions and exhibits." See Aversa v. United States, 99 F.3d 1200, 1210 (1st Cir. 1996).

Motions brought under Rule 12(b)(1) are subject to the same standard of review as Rule 12(b)(6) motions. Negron-Gaztambide v. Hernandez-Torres, 35 F.3d 25, 27 (1st Cir. 1994); Torres Maysonet v. Drillex, S.E., 229 F.Supp.2d 105, 107 (D.P.R. 2002). Under Rule 12(b)(6), dismissal is proper "only if it clearly appears, according to the facts alleged, that the plaintiff cannot recover on any viable theory." Gonzalez-Morales v. Hernandez-Arencibia, 221 F.3d 45, 48 (1st Cir. 2000)(quoting Correa-Martinez v. Arrillaga-Belendez, 903 F.2d 49, 52 (1st Cir. 1990)). Under Rule 12(b)(1), dismissal would be proper if the facts alleged reveal a jurisdictional defect not otherwise remediable.

In Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955 (2007), the Supreme Court recently held that to survive a motion to dismiss under Rule 12(b)(6), a complaint must allege "a plausible entitlement to relief." Rodriguez-Ortiz v. Margo Caribe, Inc., 490 F.3d 92, 95-96 (1st Cir. 2007)(quoting Twombly, 127 S. Ct. at 1967). While Twombly does not require heightened fact pleading of specifics, it does require enough facts to "nudge [plaintiffs']

claims across the line from conceivable to plausible." Twombly, 127 S. Ct. at 1974. Accordingly, in order to avoid dismissal, the plaintiff must provide the grounds upon which his claim rests through factual allegations sufficient "to raise a right to relief above the speculative level." Id. at 1965.

The Court accepts all well-pleaded factual allegations as true, and draws all reasonable inferences in plaintiff's favor. See Correa-Martinez v. Arrillaga-Belendez, 903 F.2d 49, 51 (1st Cir. 1990). The Court need not credit, however, "bald assertions, unsupportable conclusions, periphrastic circumlocutions, and the like" when evaluating the Complaint's allegations. Aulson v. Blanchard, 83 F.3d 1, 3 (1st Cir. 1996). When opposing a Rule 12(b)(6) motion, "a plaintiff cannot expect a trial court to do his homework for him." McCoy v. Massachusetts Institute of Tech., 950 F.2d 13, 22 (1st Cir. 1991). Plaintiffs are responsible for putting their best foot forward in an effort to present a legal theory that will support their claim. Id. at 23 (citing Correa Martinez, 903 F.2d at 52). Plaintiffs must set forth "factual allegations, either direct or inferential, regarding each material element necessary to sustain recovery under some actionable theory." Goolev v. Mobil Oil Corp., 851 F.2d 513, 514 (1st Cir. 1988).

2. Summary Judgment Standard

The court's discretion to grant summary judgment is governed by Rule 56 of the Federal Rules of Civil Procedure. Rule 56 states,

in pertinent part, that the court may grant summary judgment only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); See also Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 52. (1st Cir. 2000).

Summary judgment is appropriate if "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." See Fed.R.Civ.P. 56(c). The party moving for summary judgment bears the burden of showing the absence of a genuine issue of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

Once a properly supported motion has been presented before the court, the opposing party has the burden of demonstrating that a trial-worthy issue exists that would warrant the court's denial of the motion for summary judgment. For issues where the opposing party bears the ultimate burden of proof, that party cannot merely rely on the absence of competent evidence, but must affirmatively point to specific facts that demonstrate the existence of an authentic dispute. See Suarez v. Pueblo Int'l, Inc., 229 F.3d 49 (1st Cir. 2000).

In order for a factual controversy to prevent summary judgment, the contested facts must be "material" and the dispute

must be "genuine". "Material" means that a contested fact has the potential to change the outcome of the suit under governing law. The issue is "genuine" when a reasonable jury could return a verdict for the nonmoving party based on the evidence. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). It is well settled that "[t]he mere existence of a scintilla of evidence" is insufficient to defeat a properly supported motion for summary judgment." Id. at 252. It is therefore necessary that "a party opposing summary judgment must present definite, competent evidence to rebut the motion." Maldonado-Denis v. Castillo-Rodriquez, 23 F.3d 576, 581 (1st Cir. 1994).

In making this assessment, the court "must view the entire record in the light most hospitable to the party opposing summary judgment, indulging in all reasonable inferences in that party's favor." Griggs-Ryan v. Smith, 904 F.2d 112, 115 (1st Cir. 1990). The court may safely ignore "conclusory allegations, improbable inferences, and unsupported speculation." Medina-Muñoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 8 (1st Cir. 1990).

3) Standard for Reviewing a Magistrate-Judge's Report and Recommendation

Pursuant to 28 U.S.C. §§ 636(b)(1)(B); Fed.R.Civ.P. 72(b); and Local Rule 503; a District Court may refer dispositive motions to a United States Magistrate Judge for a Report and Recommendation. See Alamo Rodriguez v. Pfizer Pharmaceuticals, Inc., 286 F.Supp.2d

144, 146 (D.P.R. 2003). The adversely affected party may "contest the Magistrate Judge's report and recommendation by filing objections 'within ten days of being served' with a copy of the order." United States of America v. Mercado Pagan, 286 F.Supp.2d 231, 233 (D.P.R. 2003) (quoting 28 U.S.C. §§ 636(b)(1)). If objections are timely filed, the District Judge shall "make a de novo determination of those portions of the report or specified findings or recommendation to which [an] objection is made." Rivera-De-Leon v. Maxon Eng'g Servs., 283 F. Supp. 2d 550, 555 (D.P.R. 2003). The Court can "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate," however, if the affected party fails to timely file objections," the district court can assume that they have agreed to the magistrate's recommendation'." Alamo Rodriguez, 286 F.Supp.2d at 146 (quoting Templeman v. Chris Craft Corp., 770 F.2d 245, 247 (1st Cir. 1985).

DISCUSSION

1. Defendants' Motion to Dismiss on the Grounds that the Plan is a Church Plan

Defendants Watson Wyatt, the Hospital and Ruben Perez all claimed in their objection to the Report and Recommendation that the Plan is a church plan not subject to ERISA. As mentioned above, the Magistrate Judge determined to convert Defendants' Motions to Dismiss into Motions for Summary Judgment. (Docket Nos. 78, 80).

A court can convert a Rule 12(b)(1) motion to dismiss into a Rule 12(b)(6) motion or a Rule 56 summary judgment motion when resolution of the jurisdictional question is intertwined with the merits of the case. Holt v. United States, 46 F.3d 1000, 1003 (10th Cir. 1995); see also Redmon v. United States, 934 F.2d 1151, 1155 (10th Cir. 1991). The jurisdictional question is intertwined with the merits of the case if subject matter jurisdiction is dependent on the same statute which provides the substantive claim in the case. Holt, 46 F.3d at 1003.

However, while such a conversion is required in other Circuits, see e.g. Holt, 46 F.3d at 1003; this Circuit provides more flexibility. Gonzalez v. United States, 284 F.3d 281, 287 (1st Cir. 2002)("a Rule 12(b)(1) motion is sometimes transformed into a Rule 56 motion where jurisdictional issues cannot be separated from the merits of the case"). Indeed, the First Circuit has noted that when "jurisdictional facts... are inextricably intertwined with the merits of the case... the court may defer resolution of the jurisdictional issue until the time of trial." Valentin v. Hosp. Bella Vista, 254 F.3d 358, 363 n.3 (1st Cir. 2001); see also Hollingsworth v. United States, 2005 U.S. Dist. LEXIS 33224, 20-21 (D. Me. 2005).

In the instant case, the jurisdictional question is intertwined with the merits of the case because ERISA provides the basis for both subject matter jurisdiction and the causes of

action. Furthermore, the facts relevant to the merits of Plaintiffs' claims are also the facts relevant to the determination of subject matter jurisdiction. However, in accordance with our Circuit's holding in Valentin the conversion of Defendants' Motions to Dismiss into Motions for Summary Judgement is not mandatory.

Permitted to do so by Valentin, this Court defers resolution of the jurisdictional issue. There is an apparent dispute as to the fact if the Plan is a church plan or a plan subject to ERISA. As such, this Court is not prepared to rule as a matter of law that the Plan is a church plan not subject to ERISA. This is particularly true when the parties have made differing claims as to whether the plan constitutes a church plan or a plan subject to ERISA. Therefore, this Court concludes that this matter should be presented in a format better designed for a full airing of the issues, after the parties have an opportunity to narrow areas of factual dispute. Consequently, the Court hereby modifies the Magistrate-Judges findings in the Report and Recommendation that the Plan is not a church plan. As a result, Defendants' Motions to Dismiss, (Docket Nos. 34, 38,39, 45), on the grounds that the Plan is a church plan are to be denied.

2. The Plan Fiduciary

Defendant Watson Wyatt avers in its objections to the Report and Recommendation that it is not a fiduciary of the Plan. Watson Wyatt has informed this Court that the services that it provided to

the Hospital regarding the Plan included the following: 1) conducting actuarial valuation for accounting purposes, 2) providing administrative support, which included the computation of pension benefits, 3) drafting government forms and providing advice to the Hospital when it sought a ruling from the IRS that stated that the Plan was a church plan, and 4) providing support and advice to the Hospital when the Plan was liquidated. (Docket No. 80). However, Plaintiffs alleged, in their complaint, that Watson Wyatt also "managed the Plan operation since its inception," and "acted as a Plan fiduciary by exerting discretionary authority and control regarding the management and administration of defendant defined benefit Plan." (Docket No. 1, ¶ 11).

ERISA reserves fiduciary liability for "named fiduciaries," defined either as those individuals listed as fiduciaries in the plan documents or those who are otherwise identified as fiduciaries pursuant to a plan-specified procedure. 29 U.S.C. § 1102(a)(2); see also Beddall v. State St. Bank & Trust Co., 137 F.3d 12, 18 (1st Cir. 1998). However, the statute also extends fiduciary liability to functional fiduciaries, who are persons that act as fiduciaries (though not explicitly denominated as such) by performing at least one of several enumerated functions with respect to a plan. Beddall, 137 F.3d at 18. Under 29 U.S.C.S. § 1002(21)(A), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control

respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

The key determinant of whether a person qualifies as a functional fiduciary is whether that person exercises discretionary authority in respect to, or meaningful control over, an ERISA plan, its administration, or its assets (such as by rendering investment advice). See Beddall, 137 F.3d at 18; O'Toole v. Arlington Trust Co., 681 F.2d 94, 96 (1st Cir. 1982); see also 29 C.F.R. § 2509.75-8, at 571 (1986). The exercise of physical control or the performance of mechanical administrative tasks generally is insufficient to confer fiduciary status, a person is a plan fiduciary only "to the extent" that he possesses or exercises the requisite discretion and control. 29 U.S.C. § 1002(21)(A); see also Beddall, 137 F.3d at 18.

An ERISA fiduciary, properly identified, must employ within the defined domain "the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use." Id.(quoting 29 U.S.C. § 1104(a)(1)(B)). The fiduciary should act

"solely in the interest of the participants and beneficiaries," and his overarching purpose should be to "provide benefits to the participants and their beneficiaries" and to "defray[] reasonable expenses of administering the plan." Id. (quoting 29 U.S.C. § 1104(a)(1)). A fiduciary who fails to fulfill these responsibilities is "personally liable to make good to [the] plan any losses to the plan resulting from... such breach." Id. (quoting 29 U.S.C. § 1109(a)).

Plaintiffs clearly allege in their complaint that Watson Wyatt was a plan fiduciary because according to them, it exerted discretionary authority and control regarding the management and administration of the Plan. Since Watson Wyatt's Motion to Dismiss is a 12(b)(6) motion, the Court must accept this well-pleaded factual allegations as true, and draw all reasonable inferences in Plaintiffs' favor. Said factual allegation taken as true would be sufficient to determine that Watson Wyatt is a functional fiduciary, an element necessary to sustain recovery under Plaintiffs' theory. As such, Plaintiffs factual allegations are sufficient to avoid dismissal because they raise their alleged right to relief above the speculative level.[3] Consequently, this Court disagrees with Watson Wyatt's objections. Watson Wyatt's

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[3] In order to avoid dismissal, the plaintiff must provide the grounds upon which his claim rests through factual allegations sufficient "to raise a right to relief above the speculative level." Twombly, 127 S. Ct. at 1965.

Motion to Dismiss is hereby denied. (Docket No. 38).

Finally, as mentioned above, the only Defendants that filed objections to the Report and Recommendation were Watson Wyatt and the Hospital together with its Vice-President Ruben Perez. As such, the Court accepts those parts of the Report and Recommendation, which are not modified by this Opinion and Order and to which Defendants did not object.[4]

CONCLUSION

For the reasons stated above, the Court hereby **MODIFIES** in part the Magistrate-Judges findings regarding Defendants' Motion to Dismiss and **ADOPTS** the rest of the Magistrate-Judge's Report and Recommendation. (Docket No. 73). As a result, the Court **DENIES** Defendants BPPR, the Hospital and Ruben Perez's Motions to Dismiss. (Docket Nos. 34, 45). The Court **GRANTS** Ruben Perez's Motion for Partial Summary Judgement. (Docket No. 31).

Regarding PKF's Motion to Dismiss, the Court **GRANTS** the Motion

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[4] In conducting its review, the Court is free to "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1)(C). See Templeman v. Chris Craft Corp., 770 F.2d 245, 247 (1st Cir. 1985); Alamo Rodriguez v. Pfizer Pharmaceuticals, Inc., 286 F. Supp.2d 144, 146 (D.P.R. 2003). Hence, the Court may accept those parts of the report and recommendation to which the Defendants do not object. See Hernandez-Mejias v. General Elec., 428 F. Supp.2d 4,6 (D. P.R. 2005) (citing Lacedra v. Donald W. Wyatt Detention Facility, 334 F. Supp.2d 114,125-126 (D.R.I. 2004)).

on the grounds that Plaintiffs' ERISA and state law tort causes of action are time barred and that Plaintiffs failed to adequately allege a breach of contract claim against PKF. However, the Court **DENIES** PKF's Motion because Plaintiffs tort and contract causes of action are not preempted by ERISA. (Docket No. 39). The Court also **DENIES** Watson Wyatt's Motion to Dismiss in which Defendant contends it is not a plan fiduciary and that the Plan is a church plan. Nonetheless, the Court **GRANTS** Watson Wyatt's Motion to Dismiss on the grounds that Plaintiffs' state law tort claims are time barred. (Docket No. 38).

Accordingly, Plaintiffs' ERISA and breach of contract claims against PKF is dismissed with prejudice. Furthermore, Plaintiffs' state law tort claims against PKF and Watson Wyatt are dismissed with prejudice.

IT IS SO ORDERED.

In San Juan, Puerto Rico, this 29th day of October, 2007.

S/Jay A. Garcia-Gregory
JAY A. GARCIA-GREGORY
United States District Judge